



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 10046676

Date: FEB. 17, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner seeks second preference immigrant classification, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits a brief asserting that the Beneficiary is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further review of the record and issuance of a new decision.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

- (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.

Section 101(a)(32) of the Act provides that “[t]he term ‘profession’ shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries.”

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry in the occupation.

In addition, to demonstrate eligibility as an individual of exceptional ability, a petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term “national interest,” we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).¹ *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS)

¹ In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm’r 1998) (*NYSDOT*).

may, as matter of discretion², grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.³

II. ANALYSIS

A. Eligibility for the Requested Classification

As stated above, the first step to establishing eligibility for a national interest waiver is demonstrating qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability.

Although the Director's decision did not specifically address the Petitioner's qualifications for the requested classification, the request for evidence (RFE) stated that the Petitioner "holds the foreign equivalent of a United States medical degree and thus qualifies as a member of the professions holding an advanced degree. Therefore, at this time, USCIS does not need to evaluate whether the beneficiary also qualifies as an alien of exceptional ability." The submitted evaluation, however, states that the Petitioner's degrees and professional experience are the equivalent of a "Master of Public Health in Maternal & Child Health."

In addition to the definition of "advance degree" provided at 8 C.F.R. § 204.5(k)(2), the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) provides that a petitioner present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty."

First, it is not clear whether any of the Petitioner's degrees alone are the foreign equivalent of either a bachelor's or advanced degree. For example, on page one, the evaluator stated that the U.S. degree equivalence was "based upon a combination of Academics and a minimum 5 years Professional experience, as per USCIS." Page five indicated that:

Considering that a four-year Graduate's degree followed by more than five years of full-time work experience in the field of Obstetrician/Pediatrician /Physician is equivalent to a Master's degree in Maternal & Child Health it is my expert opinion that [the Petitioner], with a four year Bachelor's degree, 3 two-years Master's degree and more than 23 years of experience has no less than the equivalent of a Master of Public Health in Maternal & Child Health.

Second, the evaluator states that the "evaluation relies upon the copies of the original documents of the diplomas, transcripts, and resume provided by" the Petitioner, with no mention that he reviewed any letters.⁴ We, therefore, withdraw the Director's conclusion regarding this issue. As a result, the

² See also *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

³ See *Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

⁴ We note that the section regarding her professional experience is copied directly from her resume.

Director should determine whether the Petitioner has established that she is qualified for the requested classification, as either an advanced degree professional or an individual of exceptional ability.

B. The Proposed Endeavor

For the reasons discussed below, we withdraw the Director's conclusions that the Petitioner has established the substantial merit of the proposed endeavor and that she is well positioned to advance the proposed endeavor.

On the Form I-140, Immigrant Petition for Alien Worker, the Petitioner provided the following information:

Part 5 - Additional Information About the Petitioner

Section 3.a. Occupation: medical researcher

Part 6 - Basic Information About the Proposed Employment

Section 1. Job Title: medical researcher

Section 2. SOC Code: 29-1064⁵

Section 3. Nontechnical Description of Job: Physicians who provide medical care related to pregnancy or childbirth and those who diagnose, treat, and help prevent diseases of women, etc.

In the initial support letter, the Petitioner indicated that the proposed endeavor would be that of a "Physician Researcher, developing and conducting relevant medical research, improving human health, and engaging in clinical investigations to improve the efficiency of Physicians, which will enhance, substantially, the United States Medical field and Healthcare industry," and repeatedly references her intention to work as a "Physician Researcher." The Petitioner's June 8, 2018 "Professional Plan & Statement" confirms her intent to be a "Physician Researcher" and stated the following:

My career plan in the United States is to work making substantial contributions in the Medical field and Healthcare industry through advanced medical research, especially in women and children's health. My 23-year career working as a highly recognized Physician in Brazil has allowed me to treat many people with many different issues. This fact will be more than beneficial to the U.S. healthcare research industry, which is currently experiencing a severe shortage of Physician Researchers in my specialties of women and children's health. I will be able to work in the research and development, colleges or universities, professional schools, hospitals, pharmaceutical and medicine manufacturing companies, and even physician offices. Physician research is at the forefront of clinical advances and I will dedicate myself to making advances of major significance in the lives of many through my work.

⁵ This standard occupational classification (SOC) code corresponds to the occupation of obstetricians and gynecologists. See <https://www.onetcodeconnector.org/ccreport/29-1218.00?redir=29-1064.00>.

She also indicated that she would “fill a position as a Physician Researcher to help cure and treat diseases.”

In response to the Director’s RFE, the Petitioner, without explanation, provided a new “Professional Plan & Statement” dated October 16, 2019, which stated that:

[M]y overall proposed endeavor in the United States is to work within the medical field as a Nurse Practitioner and Nurse Midwife to continue to provide medical care to patients and support continuing health education and disease prevention programs and initiatives. I will do this by continuing to stay-up-to-date on the field, researching and better understanding the most common diagnoses in the community and planning actions to reduce unavoidable damage to reestablish health of the family as a whole, which will lead to the improvement of health care, and the overall health of the U.S.

She further explained that she has “begun to seek the validation of my Brazilian education credentials, and apply to registered nursing programs in the U.S. which will allow me to work [/] prospect work in the medical field, where I will be able to provide health education, as well as provide limited medical services, including the diagnosis and treatment of patients in the U.S.” In addition, the Petitioner stated that she intends “to apply for positions within the medical community, such as doctor’s offices or hospitals who are in need of a nurse practitioner with my level of skill and expertise” and provided a list of nurse practitioner and certified nurse midwife position openings found online.

The purpose of an RFE is to elicit information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), 103.2(b)(8), 103.2(b)(12). Here, the Petitioner did not clarify her specific proposed endeavor, but rather changed it from that of a “physician researcher” to a “nurse practitioner and nurse midwife.” A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

We note that we must rely on the specific proposed endeavor to determine whether (1) it has both substantial merit and national importance and (2) the foreign national is well positioned to advance it under the *Dhanasar* analysis.

III. CONCLUSION

For the reasons discussed above, we are remanding the petition for the Director to first consider whether the Petitioner qualifies for EB-2 classification, the threshold determination in national interest waiver cases. If the Director concludes that the Petitioner is qualified for the requested classification, he should then address whether the Petitioner has provided sufficient and consistent information regarding her specific proposed endeavor, such that a determination regarding her eligibility for a national interest waiver may be made. The Director may request any additional evidence considered pertinent to the new determination.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing analysis and entry of a new decision.